

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
 Terrell McSweeney**

In the Matter of)	
)	
)	
THE SHERWIN-WILLIAMS COMPANY,)	
a corporation,)	
)	
and)	Docket No. C-
)	
THE VALSPAR CORPORATION,)	
a corporation.)	
)	
)	

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the

accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent The Sherwin-Williams Company, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio with its executive offices and principal place of business located at 101 Prospect Avenue NW, Cleveland, Ohio 44115.
2. Respondent The Valspar Corporation, is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 1101 South 3rd Street, Minneapolis, Minnesota 55415.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

- A. “SW” means The Sherwin-Williams Company, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by The Sherwin-Williams Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. SW includes Valspar, after the Acquisition Date.
- B. “Valspar” means The Valspar Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by The Valspar Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means SW and Valspar, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirerr Corh cr C 0 oJ23A.

1. Axalta; or
 2. Any other Person approved by the Commission to acquire the Industrial Wood Coatings Business pursuant to this Decision and Order.
- F. “Acquisition” means the proposed acquisition by Respondent SW of all the voting securities of Respondent Valspar described in the Agreement and Plan of Merger, dated as of March 19, 2016, among The Sherwin-Williams Company, Viking Merger Sub, Inc., a wholly owned subsidiary of SW, and The Valspar Corporation, and any amendments, exhibits, or schedules attached thereto.
- G. “Acquisition Date” means the date the Acquisition is consummated.
- H. “Axalta” means Axalta Coating Systems Ltd., an exempted company organized, existing, and doing business under, and by virtue of, the laws of Bermuda with its office and principal executive offices located at 2001 Market Street, Philadelphia, Pennsylvania 19103.
- I. “Business Records” means all originals and all copies of any operating, financial or other information, documents, data, computer files (including files stored on a computer’s hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located, stored, or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: distributor files and records; customer files and records, customer lists,

- N. “Divestiture Agreement” means:
1. the Asset Purchase Agreement by and among The Valspar Corporation, Axalta Coating Systems Ltd., and The Sherwin-Williams Company, dated April 11, 2017, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Non-Public Appendix A; or
 2. any agreement that receives the prior approval of the Commission between Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer to purchase the Industrial Wood Coatings Business, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.
- O. “Divestiture Date” means the date on which Respondents (or a Divestiture Trustee) close on the divestiture of the Industrial Wood Coatings Business as required by Paragraph II (or Paragraph IV) of this Order.
- P. “Employee Access Period” means one (1) year from the Divestiture Date.
- Q. “Geographic Territory” means the United States of America, Canada, and Mexico.
- R. “Government Entities” means any Federal, state, local, or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- S. “High Point 1647 English Facility” means the industrial wood coatings facility located at 1647 English Road, High Point, North Carolina 27262.
- T. “High Point, 1717 English Facility” means the t e , h P o i n t

2. The Industrial Wood Coatings Research and Development Assets;
3. The Industrial Wood Coatings Color Studio Assets;
4. The Industrial Wood Coatings Contracts;
5. The Industrial Wood Coatings Intellectual Property;
6. The Tangible Personal Property;
7. All inventories primarily relating to the Industrial Wood Coatings Products, both finished goods and inputs affiliated with an Industrial Wood Coatings Facility, wherever located;
8. All consents, licenses, certificates, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement relating to the research, development, manufacture, distribution, marketing, or sale of Industrial Wood Coatings Products, and all pending applications therefor or renewals thereof, to the extent legally transferable; and
9. All Business Records relating to the research, development, manufacture, distribution, marketing, or sale of Industrial Wood Coatings Products; *provided, however,* that where documents or other materials included in the Business Records to be divested contain information: (a) that relates both to the Industrial Wood Coatings Business to be divested and to the RWW(c)4((f)-1(wDr lla)4((p)3(pur)3(-0

and all rights thereunder and related thereto related primarily to the Industrial Wood Coatings Business.

- Z. “Industrial Wood Coatings Employee” means any person employed by Valspar (i) who has spent over fifty percent (50%) of his or her time, from January 2016 to December 2016, working for or on behalf of the Industrial Wood Coatings Business, wherever

Minnesota research and development lab of Respondent Valspar and used exclusively or primarily by any Industrial Wood Coatings Employee.

applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case

2. Any agreement approved by the Commission entered into between Respondents and an Acquirer (or the Divestiture Trustee and an Acquirer) for the provision of

2. Performing their obligations under any Remedial Agreement; or
3. Complying with financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Industrial Wood Coatings Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or

- f. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and
 - g. at a proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant Industrial Wood Coatings Employee(s);
- 2. No later than ten (10) days after a request from a proposed Acquirer, Respondents shall provide the proposed Acquirer with:
 - a. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondents, with any Industrial Wood Coatings Employee;
 - b. an opportunity to inspect the personnel files and other documentation relating to any such employee, to the extent permissible under applicable laws; and
 - c. an opportunity to make offers of employment to any Industrial Wood Coatings Employee; and
- 3. Respondents shall (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Industrial Wood Coatings Employee, (ii) not offer any incentive to any Industrial Wood Coatings Employee to decline employment with a proposed Acquirer, (iii) not make any counteroffer to any Industrial Wood Coatings Employee who receives a written offer of employment from a proposed Acquirer, and (iv) remove any impediments within the control of Respondents that may deter any Industrial Wood Coatings Employee from accepting employment with a proposed Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability of such employee to be employed by a proposed Acquirer;

Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

- K. Respondents shall provide reasonable financial incentives to the senior management of the Industrial Wood Coatings Business, as listed in Non-Public Appendix C to this Order, as needed to facilitate the employment of such employees by the Acquirer.
- L. For a period of two (2) years after the Divestiture Date, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Industrial Wood Coatings Employee to terminate his or her employment relationship with an Acquirer;

Provided, however, Respondents may: (i) advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so long as these actions are not targeted specifically at any Industrial Wood Coatings Employees; and (ii) hire employees of the Industrial Wood Coatings Business who apply for employment with Respondents, so long as such individuals were not solicited by Respondents in violation of this paragraph;

Provided further, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any employee of the Industrial Wood Coatings Business if an Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the individual's employment has been terminated by an Acquirer.

- M. Until Respondents (or the Divestiture Trustee) complete the divestiture and other obligations to transfer the Industrial Wood Coatings Business as required by this Order, Respondents shall take actions as are necessary to:
1. Maintain the full economic viability and marketability of the Industrial Wood Coatings Business;
 2. Minimize any risk of loss of competitive potential for the Industrial Wood Coatings Business;
 3. Prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Industrial Wood Coatings Business; and
 4. Not sell, transfer, encumber, or otherwise impair the Industrial Wood Coatings Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Industrial Wood Coatings Business.
- N. The purpose of this Paragraph II is to ensure the continued use of the relevant assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents, minimize the loss of competitive potential for the Industrial Wood Coatings Business, minimize the risk of disclosure or unauthorized use of Confidential Business Information related to the Industrial Wood Coatings Business, prevent the destruction, removal, wasting, deterioration, or impairment of the Industrial Wood Coatings Business, except for ordinary wear and tear, and remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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and the Remedial Agreements, including, but not limited to, pursuant to the Supply Agreement; and

9. Respondents may require the Monitor and each of the Monitors consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.
- G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondent's compliance with the terms of this Order and the Remedial Agreements in a manner consistent with the purposes of this Order.
- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Remedial Agreements.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II.A. of this Order, the Commission may appoint a Divestiture Trustee to divest the Industrial Wood Coatings Business and grant the Intellectual Property License in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute an agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture.

connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph IV.E.6., the term “Divestiture Trustee” shall include all persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.5. of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order;
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee’s efforts to accomplish the divestiture;
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee’s consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission; and
 10. The Commission may require, among other things, the Divestiture Trustee and each of the Divestiture Trustee’s consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee’s duties.
- F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph IV.
- G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that:

- A. The Remedial Agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Remedial Agreements. (Case No. 2017-01004-Ts) (AA) (R-g)

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondents;
- B. Any proposed acquisition, merger, or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

NON-PUBLIC APPENDIX A

DIVESTITURE AGREEMENT

[Redacted from the Public Record, but Incorporated by Reference]

NON-PUBLIC APPENDIX B

TRANSITION SERVICES AGREEMENT

[Redacted from the Public Record, but Incorporated by Reference]

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PUBLIC APPENDIX D
MONITOR AGREEMENT